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Brimwood Homes Inc. v. Knudsen Builders Supply Co. et al : Brief of Appellant

Utah Supreme Court

Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendant-Appellant;
Bell & Bell; Attorneys for Plaintiff-Respondent;

In the
Supreme Court of the State of Utah

BRIMWOOD HOMES, INC.,
Plaintiff-Respondent,

v.

KNUDSEN BUILDERS SUPPLY COMPANY,
Defendant-Appellant,

ELBERT G. ADAMSON, PETE J. BUFFO, CAROLINE P. BUFFO, his wife, DAVID RALPH STEWART, PHYLLIS G. STEWART, his wife, CONTINENTAL THRIFT AND LOAN COMPANY, and WESTERN STATES THRIFT COMPANY,
Cross Defendants-Respondents.

Case No.
9794

APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

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Case No. 9794

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

So far as the appeal is concerned, this is an action to recover by way of counterclaim the reasonable value of building materials sold and delivered to the plaintiff by the defendant and to foreclose a materialman's lien.

DISPOSITION IN LOWER COURT

The case was tried without a jury and judgment was entered awarding the defendant the amount prayed for

in its cross-complaint. Its claim of lien was adjudged to have been waived and released. The plaintiff's complaint which sought to recover damages for slander of title, consisting of recording of the materialman's lien, was dismissed. Upon motion of the plaintiff to amend the Findings, Conclusions and Judgment, the plaintiff was awarded an attorney's fee in the amount of $1,000.00 which was deducted from the amount awarded the defendant in the original Judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks (a) reversal of those portions of the Judgment and Amended Judgment which cancel the materialman's lien and award the plaintiff an attorney's fee, (b) a judgment in its favor foreclosing its lien, (c) attorney's fee in the sum of $1,000.00, and (d) costs of preparing lien and abstracting.

STATEMENT OF FACTS

The plaintiff, Brimwood Homes, Inc., owns a tract of land in Salt Lake County which it subdivided into lots known as Jordan Village No. 2 Subdivision (R. 1). It obtained from Prudential Federal Savings and Loan Association, hereinafter designated Prudential, a commitment to finance the construction of homes on the lots (R. 152). A mortgage on each lot was executed to secure each loan. Abstracts of these mortgages are contained in Exhibit D-6. Defendant Knudsen Builders Supply Company sold and delivered to the plaintiff Brimwood Homes a large amount of building material which plain-

tiff used in the construction of the homes. As building progressed, plaintiff delivered to the defendant written authorizations to Prudential to pay defendant a specified amount on account of materials furnished to the plaintiff by the defendant (Ex. P-7-12). The payment was to be charged to the plaintiff with respect to its loan designated by number. On the other side of this written authorization was a receipt and lien release to be executed by the defendant. Armed with this authorization, defendant presented it to Prudential, executed the receipt and lien release and received the sum specified in the authorization (R. 120).

Inasmuch as the case turns upon the legal effect to be given to the receipt release, we set forth below for the convenience of the court an exact copy of one of them.

RECEIPT AND LIEN RELEASE

Salt Lake City, Utah, April 21, 1961

Received from PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, (hereinafter designated Association), the sum of Six Hundred Ten and 60/100 Dollars ($610.60) in Full payment of labor and/or ma-
Partial
terials furnished and delivered by the undersigned for construction of building and improvements on Lot 203 of Jordan Village No. 2. This receipt is executed and delivered by the undersigned to the Association to induce it to make payment to the undersigned of the above stated sum from funds held by it for the owner of above described real property and in consideration thereof the undersigned hereby waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said real property.

KNUDSEN BUILDERS SUPPLY CO.
/s/ Leland A. Searle, Treas.

Sixteen of such receipts were executed by defendant and delivered to Prudential (Ex. P-7-12). The only variation in them is with respect to the date, the amount of money and the lot number.

The trial court found that between the 19th day of February, 1961 and the 27th day of May, 1961, the defendant sold and delivered to the plaintiff, at its special instance and request, building materials of the reasonable value of $3,911.64 after crediting all payments theretofore made; that the materials were used by the plaintiff in the construction of improvements on the lots; that the last material was furnished on May 26, 1961; that defendant's notice of claim of lien was recorded on July 18, 1961; that at the time each payment was made by Prudential to the defendant, there remained a balance due from the plaintiff; and that the account was never paid in full. It also found that materials were supplied by the defendant to the respective lots both after and before the execution of the applicable receipt (R. 36-41). The plaintiff, according to the findings also made payments direct to the defendant but at no time was plaintiff's account paid in full. The court concluded that by executing the receipt releases and delivering them to Prudential, the defendant released and discharged any lien which it then had or which it thereafter acquired (R. 39-40).

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN CONCLUDING THAT DEFENDANT WAIVED AND RELEASED ITS LIEN.

Under the facts found by the court below there can be no question but that the defendant, Knudsen Builders Supply Company, was entitled to and perfected a valid materialman's lien upon Lots 203, 204, 206, 207, 212 and 213, Jordan Village No. 2 Subdivision, as security for the balance due of $3,911.64. (Sections 38-1-3, 38-1-7, U.C.A., 1953) Since Brimwood Homes, Inc. was the owner of all of these lots at the time the building material was supplied, and purchased the materials directly, Knudsen Builders Supply Company was not required to prove the amount of material that went to each lot. See *Utah Savings and Loan Association v. Mecham,* 12 Utah 2d 335, 366 P.2d 598, and cases therein cited. However, the notice of claim of lien did make this allocation and the evidence supported it.

The court's conclusion that defendant waived and released its lien by executing and delivering to Prudential the receipt release forms above set forth is contrary to well established principles of law. It gives to those instruments a legal force and effect which they do not purport to have and which the parties to them never intended they should have.

It is to be noted that the plaintiff-respondent is not a party to the receipt releases. It follows that it cannot assert any rights under them unless it can successfully maintain that they were entered into for its benefit. This point was clearly stated by the Idaho Supreme Court in a recent decision involving the construction of a similar receipt release.

> "Inasmuch as the Eldredges were not parties to the agreement, the only way its terms could

> be extended to them would be to consider them as third party beneficiaries." *Dawson v. Eldredge,* 372 P.2d 414 at 417.

The question to be decided on this appeal, therefore, is whether the plaintiff is a third party beneficiary of the receipt releases.

The receipt release has three distinct aspects. It is a receipt of a certain sum in full/partial payment of all labor and material furnished and delivered. Next, it is a release of any lien or right of lien the defendant then had. Third, it waives, releases and discharges any lien or right to lien which defendant might thereafter acquire against the property. The second phase of the instrument is mere surplusage in any instance where the first aspect is a receipt of full payment for all material previously deliverd, since such payment prevented any lien from arising on account of such material. As shown above, the receipt provisions are ambiguous with respect to the nature of the payment. They are in the alternative — that is "full" or "partial" — payment for material delivered to the lot identified therein. Neither the word "full" nor "partial" is stricken out on any receipt. It is impossible, therefore, to determine from the instrument whether the payment is partial or in full. This ambiguity is resolved by the uncontroverted evidence which establishes that the receipt release evidenced only partial payment for material delivered to each of the lots in question. Prudential's loan officer testified without objection that Prudential under the authorization for payment appearing on each receipt release was paying only for materials in the amount shown thereon; that Pru-

dential made such payment pursuant to its duty to do so under its loan agreement with plaintiff and that Prudential was not paying for anything other than for materials in the amount indicated thereon.

With respect to material sold to the plaintiff and delivered to the lots and for which payment was not made under one of the receipt releases executed by the defendant, it has no lien or right to lien until payment was demanded and denied and until it complied with the statute providing for materialmen's liens (Section 38-1-7, U.C.A., 1953). Accordingly, defendant's claims of lien for those materials and for materials sold and delivered after the date of execution of each respective receipt release would be claims to liens which it might acquire at some future date.

As the defendant makes no claim of lien against any lot for material furnished to the lot for which defendant acknowledged payment by the applicable release, we are concerned in these proceedings with only the third feature of the release. Since this purports to release a lien not in existence and which may never come into existence, the third aspect of the release must be construed as a promise of the defendant to release a future possible lien.

(A) PLAINTIFF IS NOT A THIRD PARTY BENEFICIARY UNDER THE RECEIPT RELEASES AND CAN ASSERT NO RIGHTS UNDER THEM.

The natural presumption is that parties enter into a contract for the benefit of themselves. To overcome this presumption and successfully maintain that the contract was entered into for the benefit of a stranger, it must

contain language expressing such intent and purpose. This intention must be expressed in clear, direct and unambiguous language.

> "To recover as a third party beneficiary, one must show that the contract in question was made expressly for his benefit. (Civ. Code § 1559; Shutes v. Cheney (1954) 123 Cal. App. 2d 256, 262, 266 P.2d 902.) While it is not necessary that the third party be specifically named as a beneficiary . . . 'expressly' means 'in an express manner; in direct or unmistakable terms; explicity; definitely; directly' (le Ballister v. Redwood Theatres, Inc. (1934) 1 Cal. App. 2d 447, 448, 36 P.2d 827; Watson v. Aced (1957) 156 Cal. App. 2d 87, 92, 319 P.2d 83) . . . as stated in Shutes v. Cheney, supra, 'an intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties.'" *City, etc. San Francisco v. Western Airlines,* 22 Cal. Rptr. 216, at 225.

As pointed out in *Mackubin v. Curtiss-Wright Corporation,* 57 A.2d 318:

> ". . . Even in those States which are most liberal in extending to third-party beneficiaries the right to sue on contracts made by others, the Courts recognize the right as an exception to the original rule of the common law which arose from the natural presumption that a contract is intended only for the benefit of those who enter into it. Thus it is generally accepted that before a stranger to a contract can avail himself of the exceptional privilege of suing for a breach thereof, he must at least show that it was intended for his direct benefit. German Alliance Insurance Co. v. Home Water Supply Co., 226 U.S. 220, 33 S.Ct. 32, 35, 57 L.Ed. 195, 42 L.R.A., N.S., 1000; Robins

> Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290. An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee. 1 Restatement, Contracts, sec. 147. In order to recover it is essential that the beneficiary shall be the real promisee; i. e., that the promise shall be made to him in fact, though not in form. It is not enough that the contract may operate to his benefit. It must clearly appear that the parties intend to recognize him as the primary party in interest and as privy to the promise. Haines v. Pacific Bancorporation, 146 Or. 407, 30 P.2d 763; In re Gubelman, 2 Cir., 13 F.2d 730, 48 A.L.R. 1037."

If the direct and unambiguous language of the contract discloses an intention to make a gift of the promise to the third party, or if it discloses an intention that the performance of the promise shall satisfy an actual or supposed or asserted duty of the promisee to the third party, the latter may enforce the contract. In the first premise, the third party is designated as a donee beneficiary and in the second as a creditor beneficiary. If such language discloses an intention merely to benefit the third party as an incident to the performance of the promise, the third party as an incidental beneficiary cannot maintain an action on the contract and has no rights therein. See *German Alliance Insurance Company v. Home Water Supply Company,* 222 U.S. 220, 33 Sup. Ct. 32, 57 L.Ed. 195, 42 L.R.A. (n.s.) 1000, *Restatement Contracts,* Section 133.

The foregoing propositions are expressly approved and adopted by this court in *Kelly v. Richards,* 95 Utah 563, 83 P.2d 731.

The contract under consideration obviously contains no language indicating any intention on the part of the defendant or Prudential to confer any rights or benefits upon the plaintiff either by way of gift of a promise or in satisfaction of an actual or supposed or asserted duty of Prudential to the plaintiff. On the contrary, the plain intention of the parties to the contract and the primary purpose of entering into it was to benefit themselves. The plaintiff desired to obtain payment for its materials, Prudential desired to maintain the priority and integrity of its mortgage and the sole purpose of the contract was to effectuate these objects.

The circumstances surrounding the execution of the contract also make clear this purpose. The plaintiff had negotiated loans from Prudential to finance the construction of homes on the lots. Prudential had committed itself to make the loans and had taken mortgages on the lots. These mortgages were practically valueless at the time they were executed because the lots were unimproved. To inject a substantial value into them as security, it was essential that homes be constructed on the lots. To establish and maintain the priority of the mortgages, it was necessary that the loan funds be applied to the payment of the material that went into the homes. In this situation, the parties properly undertook to protect their respective interests by entering into these receipt release agreements.

The facts in *Kelly v. Richards*, supra, are closely analogous to those in the present case. Richards Barlow Motor Company whose name was later changed to Tri-State Motors applied to Willis Overland, Inc. for a fran-

chise to sell automobiles. Overland advised Tri-State that the franchise could not be granted unless Tri-State obtained additional capital in the amount of fifty thousand dollars. Certain stockholders of Tri-State agreed to contribute thirty-five thousand dollars as additional capital in order to meet the requirement of Overland. The franchise was granted in reliance upon this agreement. Tri-State became insolvent; a receiver was appointed, and suit was brought against the stockholders to recover the thirty-five thousand dollars which they had agreed to contribute to Tri-State. Overland was not one of the creditors represented by the receiver. The court held that the complaint which set forth the above facts did not state a cause of action because neither the terms of the contract nor the facts and circumstances surrounding its execution disclosed any intention or purpose to benefit the creditors represented by the receiver. This decision, we submit, controls the present controversy.

Dawson v. Eldredge above cited is also squarely in point. Dawson agreed to furnish the labor and material to construct a dwelling house on the property of Eldredge. The latter negotiated a loan from Home Federal Savings and Loan Association to finance the construction. The loan association refused to complete the loan unless Dawson guaranteed to complete the construction and keep the property free from any liens for material or labor irrespective of who furnished it. Dawson completed the building and brought suit to foreclose his lien for labor and material which Edredge had failed to pay for. The latter successfully contended in the lower court

that Dawson had by virtue of his agreement with the loan association, waived his lien against the property. By unanimous decision the Supreme Court of Idaho reversed the trial court and directed it to foreclose the lien.

> "Inasmuch as the Eldredges were not parties to the agreement, the only way its terms could be extended to them would be to consider them as 'third party beneficiaries.' From the terms of the agreement, and the circumstances surrounding its execution, it is self-evident that it was executed for the benefit of the association to assure to them that Dawson would complete the dwelling and protect the association and its mortgage lien from claims of materialmen and mechanics, and not for the benefit of the Eldredges .... While the loan made by the association was for the benefit of the Eldredges, they receiving the proceeds thereof, the promise by Dawson to the association to complete the dwelling free of all liens was solely for the benefit of the association, to assure the improvements on the property would be made, thereby providing security for the loan. The court erred in its determination that Dawson waived his rights to claim of lien, as against the Eldredges.

(B) THERE WAS NO CONSIDERATION FOR THE PROMISE TO RELEASE FUTURE LIENS

We do not contend that the third party beneficiary must furnish consideration for the promise as a condition to enforcing it. What we do maintain is that the promise must be supported by a consideration furnished either by the promisee or the third party beneficiary. In the present case, neither Prudential nor Brimwood furnished

any consideration for the promise of the defendant to release the future liens. If the release had been given in compromise of a disputed claim, there might be a basis for finding a consideration for the promise. But no such dispute existed and the undisputed testimony is that Prudential intended the release as a discharge of the lien only to the extent of the amount paid to defendant (R. 146-151). Furthermore, Prudential did not treat the execution of the initial receipt release by the defendant on each lot as sufficient to release the lot from any claim of lien by defendant for material which was not paid for. Instead, it required the defendant to execute a release affecting the same lot every time Prudential made a disbursement pursuant to the authorization for payment. In this posture of the case, the promise to release liens that may or may not arise cannot be enforced, because it is without consideration from any source. Neither the plaintiff nor Prudential give up anything for such a promise and will suffer no detriment by reason of it.

This point arose in the case of *Haines v. Pacific Bancorporation,* 30 P.2d 763. The plaintiff Haines owned 200 shares of stock in the Portland National Bank. In order to obtain control of the bank, the defendant entered into an agreement with the remaining stockholders, to purchase their stock for $150 per share. In the same contract, the defendant agreed to purchase the plaintiff's stock for $300 per share. The plaintiff brought suit on this contract to recover $60,000 for his 200 shares of stock. The Supreme Court of Oregon held that the plaintiff was an incidental beneficiary of the contract, and could not maintain any action upon it. It also pointed

out that plaintiff could not enforce the promise, because there was no consideration for it. We quote from the opinion at page 764:

> "It is clear from these allegations of the complaint that the consideration for the promise relied upon by the plaintiff was the transfer to the defendant of stock by persons other than plaintiff for which the stipulated price has been paid. The contract, therefore, was not made for the sole benefit of the plaintiff, nor was the primary purpose of the contract to benefit the plaintiff. He was not a party to the contract. He furnished no part of the consideration, and whatever benefit he was to receive was merely incidental to the terms of a sale of property in which he had no interest. . . ."

(C) EQUITY FORBIDS THE CONSTRUCTION OF THE RECEIPT RELEASE ASSERTED BY PLAINTIFF.

To allow the plaintiff to use the receipt release to deprive the defendant of a valid and subsisting lien upon the property would amount to the condonation of a fraud upon the defendant even though the language of the instrument may be sufficient to accomplish that effect. In *Esser v. Community, etc. School District No. 62*, 81 N.E. 2d 270, 335 Ill. App. 199, the plaintiff had agreed to construct a school building for the defendant. In the course of construction of the building, the bank in which the school district's funds were deposited failed and defendant was unable to pay the plaintiff for the labor and material furnished. The district applied to a federal agency for funds to complete the building. The agency required that the plaintiff release its claim against the

district in order to give priority to the government loan. The plaintiff released his claim and the government consummated the loan. The district then refused to pay the plaintiff asserting that he had released his claim. The court held otherwise. The following quotation is particularly applicable to the present case.

> "... There is also another rule of construction which applies in the present case. If A receives a contract or other instrument from B, knowing that it was designed by B to bear a particular interpretation and to be used only for a specific purpose, then A has no right to give it a different interpretation, or to use it for a different purpose, though such new purpose may be consistent with the language of the instrument. *To permit A to pervert the instrument from the purpose for which he knew it was intended by B, would be to permit him to commit a fraud. This rule is founded upon the plainest dictates of natural justice.* (Italics ours.) The above rule is the established law of this State and has been followed in numerous cases. It is particularly applicable to the release in the instant case. Defendant District is governed by the same standard of honesty as a private corporation or a private citizen and the law will not countenance any evasion by it of its just debt."

POINT II.

THE JUDGMENT AGAINST THE PLAINTIFF AND THE CROSS-DEFENDANTS CANNOT BE REVIEWED BECAUSE NO APPEAL HAS BEEN TAKEN FROM IT.

On December 6, 1962, the plaintiff and cross-defendants filed in the district court a pleading designated

"Statement of Points and Notice of Cross-Appeal" in which they give notice that they "hereby cross-appeal to the Supreme Court of the State of Utah." Then follows a "Statement of Points on behalf of the plaintiff" asserting that the court erred in finding a total debt due of $3,911.64 plus interest on the ground that: 1. the evidence does not support such finding and conclusion; 2. that it is not within the pretrial order; 3. that the finding was based on an open "amount" which was not pleaded and was a surprise and a prejudice to the plaintiff; 4. that plaintiff should have been granted relief because of the failure of defendant to release its lien, or in the alternative that the issue be dismissed without prejudice. The document then recites that the cross-defendants join in and rely on point 4 of the statement of errors.

Appellant contends that the foregoing notice and statement is a nullity and presents nothing for review.

The defendant appealed from specific portions of the judgment entered in the lower court. The judgment was partly in favor of the defendant and partly in favor of the plaintiff. The parts which were in favor of the plaintiff were those which adjudged the lien claimed by the defendant to be invalid and unenforceable and awarded the plaintiff $1,000 as attorney's fee to be deducted from the amount due to the defendant from the plaintiff. No appeal from the portion of the judgment dismissing the plaintiff's complaint nor that awarding the defendant the sum of $3,911.64 plus interest has been taken by either the plaintiff, the defendant or any cross-defendant. The time to appeal from that portion of the

judgment expired several days before the plaintiff filed the so-called cross-appeal.

The notice given by the plaintiff and cross-defendants makes no reference to any judgment or portion of judgment whatever. It states only that plaintiff and cross-defendants cross-appeal. What they cross-appeal from is simply a blind spot. The most that could be reaonably read into this notice is that the parties cross-appeal from the judgment appealed from by the defendant. No other meaning of the words "Cross-Appeal" standing alone seems permissable.

Since the statement of points is directed to a portion of the judgment not appealed from, it must under repeated decisions of this court be disregarded. *Rosenthyne v. Mathews*, 51 Utah 38, 168 Pac. 957; *Utah Association of Credit Men v. Board of Education*, 54 Utah 135, 179 Pac. 975; *Hartford Accident, etc. v. Clegg*, 103 Utah 414, 135 P.2d 919.

Rule 74 of the Utah Rules of Civil Procedure provides for joint or several appeals and also cross-appeals. Paragraph (a) states that parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom, or any one or more may appeal separately, or two or more may join in an appeal. When any one or more parties have filed a notice of appeal as required by Rule 73, other parties may, under Paragraph (b) of Rule 74, "cross appeal from the order or judgment of the lower court without filing a notice of appeal." If a cross-appeal is taken, the party shall within ten (10) days file a statement of points on which he intends to rely on such cross-appeal.

Paragraph (b) of Rule 74 is an anomaly. There is no comparable provision in the Federal Rules of Civil Procedure or in any statute previously enacted. Admittedly, it is ambiguous and confusing. We submit that the cross-appeal provided for in paragraph (b) is a cross-appeal from the same judgment that appellant has appealed from, and that compliance with it does not bring up for review any judgment or part of a judgment not identified in the apellant's notice of appeal. The purpose of paragraph (b) is to allow the cross-appellant to present additional grounds for affirming the judgment appealed from in cases where appellant has made a statement of points relied on and has brought to this court only parts of the record in the lower court.

There is no room in the present case for the procedure outlined in paragraph (b) because the appellant has brought up the entire record and has not specified other than in this brief the points on which it intends to rely. No other effect can be given to this paragraph without nullifying virtually the entire procedure outlined in Rule 74.

The respondents may, without resorting at all to Rule 74(b), invoke the consideration by this court of any ground or reasons that are open under any part of the record. It may do this in its brief. It may not, however, make Rule 74(b) perform the functions of Rule 73.

Regardless of the interpretation that may be placed upon paragraph b of Rule 74, the points relied upon by the cross-appellants are without merit. The contention that the evidence does not support a finding that Brimwood Homes, Inc. is indebted to Knudsen Builders Sup-

ply Company in the sum of $3,911.64 plus interest is without any foundation whatever. The finding is not only in accordance with the uncontradicted evidence but the fact was in effect admitted by the officers of Brimwood Homes, Inc. and also by its counsel in open court. The further point made that the finding is based on an issue not within the pretrial order and was a surprise to the plaintiff which, if correct, would simply point up the fact that there was no genuine dispute between the parties as to the amount due to the defendant. The issue is, however, presented in paragraph 1 of the pretrial order (R. 31).

Any assertion that the finding is based on an open account not pleaded is contrary to the record (see Paragraph 1 of the Counterclaim and cross-claim (R. 9).

The claim that plaintiff should have been granted relief under its complaint falls by the wayside, if as we contend on this appeal, the defendant did not waive or release its materialmen's lien. We do not concede that the plaintiff would be entitled to any relief under its complaint even if the defendant did release its later-acquired lien but we need not discuss this point since it is clear that the receipt release had no such effect.

SUMMARY

Brimwood Homes Inc. was not a party to any of the receipt releases, and cannot successfully claim any rights or interests thereunder. None of the instruments contain any provision or language manifesting any intention of the formal parties to confer any direct benefits upon the

plaintiff. On the contrary, the release is clear to the effect that its provisions were intended to benefit the parties to it. The primary purpose of the release was to enable the defendant to get its money, and Prudential to preserve and maintain the priority of its mortgage liens. There is no consideration for any promise to release future liens and elementary principles of fair dealing prevent the plaintiff from using the receipt release for that purpose. The conclusion of the trial court that the receipt release operated to free the defendant's property from all future liens of the defendant is a perversion of this intent and purpose, and is without any support in reason or in law.

The plaintiff has not appealed from the portions of the judgment in favor of the defendant, and this court cannot, therefore, review those portions. Respondents' cross-appeal and statement of points must be regarded as additional grounds relied upon by them for affirming the judgment appealed from. They are superfluous since such additional points may be presented in the respondent's brief.

The portions of the judgment appealed from by appellant should be reversed and the trial court should be directed to grant the defendant a decree foreclosing its lien and awarding it an attorney's fee in the amount of $1000.

Respectfully submitted,

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